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IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1983

No. _____

CAPITOL CITY
LUMBER COMPANY, INC.

Petitioner,

vs.

NATIONAL LABOR RELATIONS
BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. In a case involving an alleged breach of a collective bargaining agreement, does the National Labor Relations Board have jurisdiction to construe that contract, notwithstanding the existence of make-whole remedies elsewhere for the parties to the contract.

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The Petitioner, Capitol City Lumber Company, Inc., respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States

Court of Appeals for the Sixth Circuit on November 11, 1983.

OPINION BELOW

The opinion of the Court of Appeals for the Sixth Circuit, recommended for publication, appears in Appendix C hereto. The opinion of the National Labor Relations Board, reported at 263 NLRB No. 102, appears in Appendix B hereto. The opinion of the Administrative Law Judge, reported as part of the opinion of the National Labor Relations Board at 263 NLRB No. 102, appears in Appendix A hereto.

JURISDICTION

The opinion of the Court of Appeals for the Sixth Circuit was entered on November 11, 1983. This petition for

certiorari is filed within ninety (90) days of that date. This Court's jurisdiction is invoked pursuant to 28 USC § 2350(a) and 28 USC § 1254(1).

QUESTIONS PRESENTED

1. In a case involving an alleged breach of a collective bargaining agreement, does the National Labor Relations Board have jurisdiction to construe that contract, notwithstanding the existence of make-whole remedies elsewhere for the parties to the contract.

STATEMENT OF THE CASE

In the spring of 1979, Petitioner and the United Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of

America (hereinafter referred to as "the Teamsters") began negotiations for a successor collective bargaining agreement to the one then in force between the parties. On May 25, a tentative agreement was reached for a one-year contract, effective from May 1, 1979 through April 30, 1980, and then "from year to year thereafter unless written notice of desire to cancel or terminate the agreement is served by either party upon the other at least sixty (60) days prior to the expiration." (General Counsel's Exhibit 3, Article XXIII, p 9). The tentative agreement also contained an arbitration procedure which required initial presentation to the employer of any grievance no later than ten (10) days after the aggrieved party had knowledge of it, and then, ultimately, to an arbitrator. The total cost to the Petitioner was

sixty-seven and one-half cents ($.67 1/2) per hour per union member.

Although Petitioner's union employees ratified the proposal on May 26, 1979, the Teamsters did not present a final written version of it to Petitioner until late November, 1979. At that time, a question arose concerning Petitioner's obligation to contribute to the Teamsters Welfare and Pension Funds. Specifically, Petitioner explained that its agreement with the Teamsters was for the term of one year, while the Teamsters insisted that membership conditions established by the Funds required a three-year commitment.

On December 14, 1979, Petitioner met with the union representative concerning this problem. In an attempt to satisfy the parties' respective apprehensions, the Teamsters prepared a Letter of Understanding which purported to clarify

the situation. Petitioner, believing that the Letter established the one-year agreement that it had wanted, accepted the Letter as a part of the collective bargaining agreement; and, on December 28, 1979, that agreement, having expressly incorporated the Letter of Understanding, was executed by the parties.

Petitioner made the contributions to the Welfare and Pension Funds as required by the contract from May 1, 1979, through April 30, 1980. On that date, the contract automatically renewed itself since neither party had provided timely notice to the other to cancel or renegotiate as the contract required. Petitioner continued to make payments to the funds consistent with the amount required to be paid for the first year of the contract. The Teamsters, contending that Petitioner should have been paying amounts required for the second

year, filed a charge with the National Labor Relations Board, which issued a Complaint on August 26, 1980. On April 30, 1981, prior to the hearing on this Complaint before the Administrative Law Judge, the contract was terminated by the giving of proper notice, and Petitioner then ceased to make contributions to the Funds.

At no time prior to the hearing on the Complaint issued by the National Labor Relations Board did the Teamsters ever attempt to invoke the arbitration procedure or fulfill its requirements to resolve its dispute with Petitioner concerning interpretation of the contract. At the hearing, however, Petitioner was asked for the first time whether it would waive these requirements and submit the matter to arbitration. Petitioner declined to do so, and, after the hearing was concluded, the Administrative Law Judge found that

Petitioner had committed an unfair labor practice with respect to its payments to the Funds, a decision which was subsequently affirmed by the National Labor Relations Board.

REASON FOR GRANTING THE WRIT

Petitioner seeks review of the decision of the Court of Appeals for the Sixth Circuit because it does not accord with prior decisions of this Court concerning this matter. In NLRB v C & C Plywood Corp., 385 US 421 (1967), this Court held that the NLRB could construe a labor agreement to decide an unfair labor practice case. At first glance, C & C Plywood might well seem to dispose of the present case; however, there are several dispositive distinguishing factors which make C & C Plywood inapplicable. Consequently, the

decision of the Court of Appeals was erroneous and should be reversed.

Petitioner contends that C & C Plywood holds that the NLRB can construe a labor agreement to decide an unfair labor practice case only where the parties have no make-whole remedy in an alternative forum. Thus, in C & C Plywood, this Court observed the problem that the union would have had, had it brought an action in state or federal court. Since the employer in that case had bestowed a benefit on his employees in an attempt to bypass the union, the latter's remedies in a court proceeding would have been almost nonexistent. Only by seeking NLRB jurisdiction could the union have had its full statutory rights vindicated. The NLRB offered the only forum where the union could obtain its make-whole remedy.

The present case, however, offers several other forums in which a make-whole remedy would have been available. A state or federal court could easily construe the contract and order that payments be made pursuant to it, the identical relief that the union seeks. Indeed, contract suits are handled almost daily by the courts, and their expertise in such matters far outweighs the NLRB's. Moreover, the remedy offered by the courts is more easily enforced; it would be self-executing, while the NLRB order is not. Given the existence of a make-whole remedy elsewhere, as required by C & C Plywood, it was in error for the Court of Appeals to extend the jurisdiction of the NLRB to cover this situation.

In making its determination concerning NLRB jurisdiction, the Court of Appeals relied on NLRB v Strong, 393 US 357 (1969).

However, such reliance is misplaced since Strong involved only the scope of an NLRB remedy, with this Court holding that once an unfair labor practice has been established, the NLRB has broad powers to make the aggrieved party whole again. The case at bar, contrariwise, involves the scope of NLRB jurisdiction, entirely different than the scope of a remedial order. The Court of Appeals' decision did not recognize this distinction and was consequently erroneous.

The contract between Petitioner and the Teamsters contained an arbitration clause, another distinguishing factor from that presented in C & C Plywood. Because the Teamsters had not complied with the time requirements of the clause, and Petitioner had refused to waive those requirements, the Court of Appeals held that the NLRB was correct in not deferring its jurisdiction.

However, the Court of Appeals again misunderstood Petitioner's claim. The issue involved in this case is not whether the NLRB should assert its jurisdiction, but whether it had any jurisdiction at all. The arbitration clause gave the union another make-whole remedy, in adddition to those offered by the courts, and constituted a further factor required by C & C Plywood.

Petitioner offers further exception to the finding of the NLRB, as upheld by the Court of Appeals, that it was Petitioner's actions that caused the failure of the arbitration procedure. On the contrary, it was the union's action that precipitated the failure of that procedure. It is undisputed that the union failed to assert its rights within the time limits that it had negotiated; Petitioner's refusal to waive those requirements was merely a

lawful response to an improper action. To hold otherwise is to allow the union to violate provisions of the contract without a concurrent loss of its rights, thus freeing it from its obligations under the contract. It was the union's actions that caused the failure of the arbitration agreement, and this action is a further element that the Court of Appeals did not entertain in holding that the NLRB had jurisdiction in this case.

It is axiomatic that the NLRB has no jurisdiction to police collective bargaining agreements. C & C Plywood at pp 428-29. Yet the decision of the Court of Appeals does not heed this maxim in holding that the NLRB had jurisdiction to construe this contract. It fails to acknowledge the factors that this Court, in C & C Plywood, held as constituting jurisdiction; instead, it gives free rein

to the NLRB to construe any labor contract, at any time, if done under the pretext of deciding an unfair labor practice case. Moreover, it implicitly sanctions the belief that any alleged breach of a collective bargaining agreement will constitute a violation of § 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 159 (a)(1), thus necessarily causing the NLRB to prosecute and enforce the agreement. This is far from the intent or letter of the opinions of this Court dealing with this issue and must therefore be reversed. Accordingly, Petitioner prays that this Court grant Petitioner a Writ of Certiorari and review and reverse the decision of the Court of Appeals.

CONCLUSION

For the foregoing reasons, Capitol City Lumber Company hereby respectfully prays that its petition for Writ of Certiorari be granted.

Respectfully Submitted,

HUBBARD, FOX, THOMAS,
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Dated: 1-10-84

APPENDIX A

ADMINISTRATIVE LAW JUDGE DECISION
August 5, 1981

CAPITOL CITY LUMBER
COMPANY

and Case 7-CA-18029

LOCAL NO. 580, INTER-
NATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS
OF AMERICA

George D. Mesritz, Esq.,
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of Milwaukee, WI, for the
Charging Party.
Thomas A. Bengtson, Esq.,
of Lansing, MI, for the
Respondent.

DECISION

Statement of the Case

MARVIN ROTH, Administrative Law Judge: This case was heard at Charlotte, Michigan on May 12, 1981. The charge was filed on July 21, 1980, by Local No. 580, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein the "Union"). The complaint, which issued on August 26, 1980, and was amended at the hearing, alleges that Capitol City Lumber Company (herein "Respondent" or the "Company"), violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended. The gravamen of the complaint is that the Company has allegedly failed and refused to make welfare and pension fund contributions as required by its collective-bargaining agreement with the

Union. The Company's answer, as amended, denies the commission of the alleged unfair labor practices. All parties were afforded full opportunity to participate, to present relevant evidence, to argue orally and to file briefs. General Counsel and the Company each filed a brief.

Upon the entire record in this case and from my observation of the demeanor of the witnesses, and having considered the arguments of counsel and the briefs submitted by General Counsel and Respondent, I make the following:

FINDINGS OF FACT

I. The Business of Respondent

The Company, a Michigan corporation with its principal office and yard in Lansing, Michigan, is engaged in the sale and distribution of lumber and related

building products. In the operation of its business, the Company has annual gross revenues in excess of $500,000, and annually purchases goods and materials valued in excess of $50,000 directly from points outside of Michigan. I find, as the Company admits, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Bargaining Unit Involved

It is undisputed, and I so find, that at all times material the Union has been and is the exclusive collective-bargaining

representative of the employees in the following appropriate unit: All full time and regular part time employees employed by the Company at or out of its facility located at 700 E. Kalamazoo Street, Lansing, Michigan; but excluding all sales, office clerical and casual employees, guards and supervisors as defined in the Act.

IV. The Alleged Unfair Labor Practices

A. Background: the 1979 Contract

The issue of whether the Company unlawfully refused to make fund contributions, essentially turns on the meaning of agreements entered into between the Company and the Union in 1979.

In the spring of 1979 the Company and the Union engaged in negotiations for a new

contract covering the unit employees.[1] Union recording secretary James Cooper and two employee stewards comprised the union negotiating team. Initially the Company was represented by its president James Olson, vice president Clarence Hargrave and attorney Thomas Bengtson. Another official, a Mr. Phillips (who was no longer with the Company at the time of this hearing) also served on the Company team. However after the first or second bargaining session president Olson left on a trip to Georgia where he soon suffered the first of a series of heart attacks. Olson returned to Lansing on May 14 and resumed his full time duties as president in July. In the meantime the remainder of the team continued with the negotiations. On May 7 the unit employees commenced a

---

[1]All dates herein are in 1979 unless otherwise indicated.

lawful economic strike in support of the Union's demands, and the strike continued until May 26. On May 25 the negotiators reached complete agreement on the terms of a new contract. The next day (May 26) the employees voted to ratify the contract and return to work.[2] However the contract was not signed, and the employees did not receive a wage increase as provided in the contract. Olson testified that the Company's negotiating team was not authorized to enter into a binding contract. However at one point Olson admitted that "we had negotiated and agreed

---

[2]Union secretary Cooper testified that six or seven of seven or eight unit employees participated in the ratification vote. Company president Olson testified that there were 11 employees in the unit. Regardless of the number of employees in the unit, it is undisputed that the employees voted to ratify the contract. Indeed the evidence fails to indicate that the parties agreed that employee ratification was a condition of a contract.

upon a one-year contract." Cooper testified without contradiction that the Union was never informed that the Company's negotiators lacked authority to bind the Company. (Cooper and Olson were the only witnesses presented in this proceeding). Olson testified that he did not see the negotiated contract until late November. His assertion is incredible. Olson admitted that he was kept informed of the progress of negotiations and of the strike even when he was hospitalized in Georgia. As indicated, he returned to Lansing 11 days before agreement was reached, and he was back on the job by July. I find that the Company and the Union reached final agreement on a contract on May 25, and they anticipated that Olson would sign the contract when he recovered from his illness. Instead, Olson took advantage of the Union's good will and concern over his

illness, by delaying his signing of the contract until the onset of winter, when he knew that the Company could easily withstand a strike. Olson then sought to back away from the agreed upon contract.

The agreed upon contract purported to be effective from May 1, 1979 through April 30, 1980 and "from year to year thereafter unless written notice of desire to cancel or terminate the agreement is served by either party upon the other at least sixty (60) days prior to date of expiration." However the contract provided for employer contributions to the Michigan Conference of Teamsters Welfare Fund and the Central States Southeast and Southwest areas Pension Fund (herein respectively "Welfare Fund" and "Pension Fund" and collectively "Funds") in accordance with a time schedule which ran beyond April 30, 1980. Specifically, the contract (Article

XIX) required the Company to make contributions per week per employee as follows:

Welfare Fund (UE plan)

$25 effective May 1, 1979
$28 effective April 1, 1980
$31 effective April 1, 1981

Pension Fund

$21 effective May 1, 1979
$24 effective May 1, 1981
$31 effective May 1, 1981

Cooper testified that the Company was unwilling to enter into a contract of more than one year duration. However Cooper explained to the Company's negotiators, and specifically to attorney Bengtson, that the Funds each required a 3-year package. Therefore the parties negotiated a 3-year package, and the Company agreed to participate in both the health and welfare and the pension plans for 3 years.

Cooper delayed taking action over the Company's failure to honor its contract,

out of consideration of Olson's illness. However the employees were becoming restive over their failure to receive a wage increase as provided in the contract. On December 14 Cooper met with Olson, who was accompanied by vice president Hargrave. Olson expressed concern about the 3-year package. According to Cooper, Olson wanted a means whereby in future negotiations, he could show the employees that the welfare and pension plans constituted a cost to the Company, and should be recognized as part of the cost of any future negotiated raises. Cooper suggested a letter of understanding, and he undertook to prepare such a letter. On December 28 Cooper and Olson signed the letter, the text of which read as follows:

> Letter of Understanding between Teamsters Local Union No. 580 and Capitol City Lumber Company.
>
> In the May 1, 1979 contract negotiations in order to remain with the Michigan Conference of Teamsters Welfare Fund UE Plan, and Central States Southeast and Southwest Areas Pension Plan, a thirty-six (36) month commitment was required due to plan regulations.
>
> The money package negotiated was sixty-seven and one half cents (67 1/2) per hour providing forty-five cents (45¢) per hour applied to wages and the remaining twenty-two and one half cents (22 1/2) per hour applied as contributions to maintain the Health and Welfare and Pension Plans from May 1, 1979 through April 30, 1980.
>
> In order to maintain the Health and Welfare and Pension plans from May 1, 1980 it will be necessary to deduct the cost from the money package negotiated in future negotiations.

At the same time, Cooper and Olson signed the agreed upon contract and participation agreements for each Fund, with the insertion of the following proviso in each document: "Note: The letter of understanding between [the Company] and [the Union] dated December 14, 1979

(attached) shall become a part of this contract [or agreement]." A copy of the letter of understanding was attached to each of the other documents. In May, the parties did not negotiate a money package as such, and the original contract did not contain any reference to a money package. However the figure of 67 1/2 cents per hour, as indicated in the letter of understanding, reflected the combined cost of the negotiated hourly wage increase and the first year cost of the welfare and pension plans. Cooper testified that he informed the employees of the letter of understanding. Thereafter the employees received their wage increase as provided in the contract, retroactive to May 1, 1979.

Company president Olson testified that when he met with Cooper, he objected to any 2nd and 3rd year commitment for the welfare and pension plans. Cooper explained that

he could put together a package only on a 3-year basis. According to Olson, he responded that this was the Union's problem, and he insisted that he did not want anything more than "the one-year contract we agreed to." Olson testified that Cooper said he would check with Mrs. McKim (The Union's secretary-treasurer), and thereafter Cooper prepared the letter of understanding. Olson further testified that he had "no recollection" of telling Cooper that he wanted to inform the employees that any negotiated money package would include the fringe benefits.

I credit Cooper. As indicated Olson was somewhat equivocal in his denial of the position attributed to him by Cooper. Additionally, although Cooper was alone when he met with Olson, the Company president was accompanied by Vice President Hargrave, who was also a

principal figure in the 1979 contract negotiations. Nevertheless the Company did not present Hargrave as a witness. The inference is warranted, and I so find, that had Hargrave been presented as a witness, his testimony would have been unfavorable to the Company's interest. Martin Luther King, Sr., Nursing Center, 231 NLRB 15 n. 1 (1977). More fundamentally, Cooper's testimony is consistent with the language of the letter of understanding, as well as the circumstances of the negotiations. Although Cooper could have lawfully insisted that Olson sign the contract agreed upon in May, he chose not to do so. Instead he agreed to add the letter of understanding to the contract. Therefore, regardless of the outcome of the prior negotiations, the letter became a part of the contract. See American National Insurance Company, 89 NLRB 185, 187-88

(1950), modified on other grounds, 343 U.S. 395 (1952). However the letter cannot be viewed in isolation. Rather it must be construed, if possible, in a manner which is consistent with the rest of the contract. On its face the letter does not purport to nullify the 3-year benefits provision spelled out in Article XIX of the contract. Rather, the letter simply purports to relate to the conduct of "future negotiations." Assuming arguendo, as contended by Olson, that the letter effectively nullified the second and third steps of the benefit programs, then such an agreement, if covert, would constitute a fraud upon the Funds, because the Funds required a 3-year package as a condition for participation in the Funds. If the letter on its face purported to nullify the second and third steps, or even raised a question in this regard, then it is unlikely

that the Funds (which were given copies of the letter) would have accepted the contract as a basis for unit participation in the Funds. However they did accept such participation. Therefore it is evident that all parties, including the Funds, interpreted the contract, including the letter of understanding, as including the three-step benefit program. Assuming alternatively that the letter of understanding committed the Company and the Union to total money package of 67 1/2 cents per hour for at least 3 years, then this would mean that the Union, in order to obtain the benefit program, impliedly agreed to progressive wage decreases after April 1, 1980. This is highly unlikely. I find, as indicated by the contract in its entirety, including the letter of understanding, that the parties agreed to a three-step benefit package, and further

agreed that the cost of such package would be taken into consideration in future wage negotiations. "The Board has held that health and welfare and pension plans which are part of an expired contract, consitute [sic] an aspect of employee wages and a term and condition of employment which survives the expiration of the contract." Henry Cauthorne, an individual, t/a Cauthorne Trucking, 256 NLRB No. 115 (1981), sl. op. at 4. A fortiori, the parties may negotiate such provisions for a term which extends beyond that of other contract provisions. Cauthorne, sl. op. at 5-7.

B. The Alleged Refusal to Make Contributions As Provided In the Contract

In the present proceeding, the parties stipulated that the Company made contributions to the Funds in accordance with the first step of Article XIX ($25 per week per employee to the Welfare Fund and $21 per week to the Pension Fund) through April 30, 1981. Technically the stipulation is inaccurate. Due to an error in billing by the Pension Fund, the Company contributed $14 per week per employee to that fund. However prior to the commencement of the hearing the Company and the Union entered into an agreement (without prejudice to their positions in this litigation) whereby the Company agreed that upon receipt of a correct billing, it would increase its pension fund contribution to $21 per week per employee

for the period from May 1, 1979 to April 30, 1981. There is no contention in this proceeding that the Company failed to make the proper contributions for the period from May 1, 1979 through March 30, 1980.

In 1980 the Union sent letters to the Company purporting to reopen the contract for negotiations. However the purported 60-day notice was untimely; i.e., it was sent less than 60 days prior the expiration date of the contract. The Union requested negotiations, but the Company stood on its rights and the Union acquiesced in the Company's position. Therefore by its own terms the contract continued in effect for an additional year, i.e., until May 1, 1981. The Company contends in essence (Br. 3), that the contract provided for a money package of 67 1/2 cents per hour, and therefore it was obligated to continue contributing only the amounts set forth in

the first step of Article XIX. For the reasons heretofore discussed, the Company's contention is erroneous. The Company lawfully refused to reopen the contract for negotiations. However by exercising this right, the Company precluded for another year the "future negotiations" contemplated in the letter of understanding. Therefore, by operation of the terms of the contract, the wage rate remained in effect, and the second step of welfare and pension plan contributions also became operative. Indeed the second step of the pension plan became operative as of April 1, 1980 (one month prior to automatic renewal of the contract), and the third step became operative as of April 1, 1981, one month prior to the next expiration date. Therefore the Company breached its contract by failing to make the contributions as set

forth in Article XIX, at least through April 30, 1981.

No evidence was introduced concerning 1981 negotiations. However Union counsel admitted on the record that the contract was terminated, i.e., presumably as of April 30, 1981. Therefore the question is presented as to whether the Company was obligated to make contributions to the funds after that date. The pension fund participation agreement, signed by Olson and Cooper, contains the following provision:

> This Participation Agreement shall continue in full force and effect during the life of the current collective bargaining agreement between the parties and during all renewals and extensions thereof; subject only to increases in the rate of contributions as required by such renewals or extensions. The obligation to make contributions tothe [sic] Fund shall be terminated when and if such contributions are no longer required by a collective bargaining agreement between the parties.

The welfare fund contribution agreement contains in pertinent part the following language: "The parties herein specifically acknowledge and agree, however, irrespective of contract expiration dates, if benefits are desired beyond the below designated dates, [scheduled contribution] the then current rates for the plan desired will be automatically billed and must be paid."

As heretofore found, the Company and the Union, in order to comply with the requirements of the Funds, negotiated and agreed upon a 3-year benefit program. Therefore the Company remained contractually obligated to continue contributing to the Funds in accordance with the second and third steps of Article XIX, notwithstanding the expiration of the contract. In sum, by reason of Article XIX, the Company's obligation survived and

continued after the termination of the contract. Therefore, as the Company was "required by a collective-bargaining agreement" to contribute to both Funds for a period of 3 years, the contract met the conditions of Section 7 of the pension participation agreement, as well as the less stringent conditions of the welfare contribution agreement. Compare, Cauthorne, supra, sl. op. at 7.[3]

I find that the Company, by failing and refusing to make welfare and pension contributions as required by its contract with the Union, invaded the Union's "statutory right as collective-bargaining

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[3]Company President Olson testified that the third step pension contribution should be $27 per week per employee instead of $31. His assertion was unexplained, and is contrary to the express provisions of Article XIX of the contract and of the participation agreement. I find that the Company was obligated to make contributions as set forth in Article XIX.

representative of employees in the unit to bargain about any change in the terms and conditions of employment for such employees." Therefore the Company violated and is violating Section 8(a)(1) and (5) of the Act. C & C Plywood Corporation, 148 NLRB 414, 415 (1964), aff'd, 385 U.S. 421 (1967); see also, Cauthorne, supra, sl. op at 6.[4]

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[4]This is not an appropriate case for deferral to contractual grievance and arbitration. First, no timely grievance was filed, and the Company has refused to waive its right to object to any grievance on that ground. See, Union Electric Company, 214 NLRB 320, n.2 (1974). Second, as the contract expired on May 1, 1981, a substantial portion of this case, consisting of the Company's failure to make contributions after that date, would not in any event be subject to binding arbitration. See, The Hilton-Davis Chemical Company, Division of Sterling Drug, Inc., 185 NLRB 241 (1970). Whether or not the Company has any obligation beyond April 30, 1982, is a matter which is dependent upon factors which were not fully litigated and indeed could not be fully litigated in the present proceeding.

Conclusions of Law

1. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All full time and regular part time employees employed by the Company at or out of its facility located at 700 E. Kalamazoo Street, Lansing, Michigan; but excluding all sales employees, office clerical employees, casual employees, guards and supervisors as defined in the Act, constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material the Union has been and is the exclusive collective-

bargaining representative of the employees in the unit described above.

5. By failing and refusing to make welfare and pension plan contributions as required by its collective-bargaining contract with the Union, the Company has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Company has committed violations of Section 8(a)(1) and (5) of the Act, I shall recommend that it be required to cease and desist therefrom and from like or related unlawful conduct,

and to take certain affirmative action designed to effectuate the policies of the Act. I shall specifically recommend that the Company be ordered to make contributions to the Welfare and Pension Funds in accordance with the 3-year schedule set forth in Article XIX of the expired contract, and to reimburse the Funds for its failure to do so. The welfare fund contribution agreement provides for employer liability "for the liquidated damages set forth in the Trust Agreement" in the event of employer delinquency. However the trust agreement is not in evidence in this proceeding. The pension participation agreement provides only for cancellation of the agreement and termination of any obligation of the Trustees in the event of persistent delinquencies. In accordance with Board policy, I shall reserve to the compliance

stage of this proceeding, the question of whether the Company should be directed to pay interest or alternative additional contributions to the Funds. Cauthorne, supra, sl. op. at n. 9. In the event that either Fund has cancelled unit coverage, I shall recommend that the Company be ordered to reimburse the employees, with interest, for any loss of claims and benefits as a result of such cancellation, unless such cancellation was caused by reasons other than the conduct herein found unlawful.[5]

---

[5]Therefore it is unnecessary for me to pass upon the Company's post-hearing proffer of the purported letter which I have designated Respondent's Exhibit 1. The questions of whether and if so when, and why coverage was cancelled, is reserved to the compliance stage. Interest as provided in the recommended Order herein shall be computed in the manner and amount prescribed in Florida Steel Corporation, 231 NLRB 651 (1977). See generally, Isis Plumbing & Heating Co., 138 NLRB 716, 717-721 (1962). Assuming that the letter (R-1) is authentic, I find that such letter does not constitute an admission on the part of the Union, because the Company has

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER

Respondent, Capitol City Lumber Company, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(cont.)
failed to prove that the person signing the letter was an agent of the Union acting on its behalf.

[6][Sic]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

(a) Failing or refusing to make contributions to the Michigan Conference of Teamsters Welfare Fund and the Central States Southeast and Southwest Areas Pension Fund for a 3-year period, as set forth in Article XIX of its expired collective-bargaining contract with Local No. 580, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, covering employees in the unit heretofore found appropriate.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action which is found necessary to effectuate the policies of the Act:

(a) Make such contributions, and reimburse said Funds for its failure to do

so, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) In the event that either Fund has cancelled unit coverage, reimburse the unit employees, with interest, for any loss of claims and benefits they may have suffered as a result of such cancellation, as set forth in the section of this Decision entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of reimbursement due.

(d) Post at its Lansing, Michigan place of business, copies of the attached

notice marked "Appendix."[7] Copies of said notice on forms provided by the Regional Director for Region 7, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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[7]In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(e) Notify the Regional Director for Region 7, in writing, within 20 days from the date of the receipt of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C. August 5, 1981

Marvin Roth
Administrative Law Judge

83-1165

Office - Supreme Court, U.S
FILED
JAN 11 1984
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1983

No. _____

CAPITOL CITY
LUMBER COMPANY, INC.

Petitioner,

vs.

NATIONAL LABOR RELATIONS
BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

HUBBARD, FOX, THOMAS,
WHITE & BENGTSON, P.C.

By: Thomas A. Bengtson

Business Address:

1900 Michigan National Tower
Lansing, Michigan 48933
Telehone: (517) 485-7176

APPENDICES B and C

APPENDIX B

DECISION OF THE NLRB
AUGUST 30, 1982

263 NLRB No. 102

D--9163
Lansing, MI

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CAPITOL CITY
LUMBER COMPANY

and

Case 7--CA--18029

LOCAL NO. 580,
INTERNATIONAL BROTHER-
HOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS OF
AMERICA

DECISION AND ORDER

On August 5, 1981, Administrative Law Judge Marvin Roth issued the attached Decision in this proceeding. Thereafter,

Respondent filed exceptions and a supporting brief and, later, filed a motion to reopen the record.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

Although we agree with the Administrative Law Judge that Respondent

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[1]We hereby deny Respondent's motion, as the evidence that it seeks to adduce is not newly discovered or previously unavailable, nor would it require a different result. See Sec. 102.48(d)(1), National Labor Relations Board Rules and Regulations, Series 8, as amended.

violated Section 8(a)(5) and (1) of the Act by refusing to make welfare and pension plan contributions as required by its collective-bargaining agreement with the Union, we do so only for the reasons that follow.

The facts of the case are basically undisputed.

In spring of 1979,[2] Respondent and the Union began negotiating for a successor collective-bargaining agreement. The Union was represented by its recording secretary, James Cooper, and two shop stewards. Respondent was represented by its president, James Olson, its vice president, and its attorney. Soon after negotiations began, Olson left on a trip to Georgia, where he suffered the first of a series of heart attacks. Contract

---

[2]All dates herein are in 1979, unless otherwise indicated.

negotiations continued while Olson was hospitalized in Georgia, and he was kept informed regarding the progress of the negotiations. On May 7, the unit employees began an economic strike in support of the Union's contract demands. On May 25, Respondent and the Union reached complete agreement on the terms of a new contract.

Since Respondent was unwilling to enter into a contract of more than 1 year in duration, the contract was effective from May 1, 1979, through April 30, 1980, and then ''from year to year thereafter unless written notice of desire to cancel or terminate the agreement is served by either party upon the other at least sixty (60) days prior to date of expiration.'' Cooper explained to Respondent's negotiators that participation in the Michigan Conference of Teamsters Welfare Fund and the Central States, Southeast and Southwest Areas

Pension Fund required a 3-year commitment with those funds. Article XIX of the contract, consequently, provided for Respondent to make weekly contributions per employee to the welfare fund as follows:

$25 effective May 1, 1979
$28 effective April 1, 1980
$31 effective April 1, 1981

It similarly provided for Respondent to make weekly contributions per employee to the pension fund as follows:

$21 effective May 1, 1979
$24 effective May 1, 1980
$31 effective May 1, 1981

The unit employees ratified the contract and returned to work on May 26. Although Olson had returned from Georgia on May 14, the Union delayed in obtaining his signature on the contract because he was still very ill. On December 14, Cooper finally met with Olson in order to sign the contract. Cooper and Olson each testified that Olson indicated misgivings about the

3-year commitment to the two funds. Cooper testified that Olson expressed concern about whether the employees would realize that Respondent would be incurring costs in the future regarding fund contributions. Cooper also testified that he drafted a letter of understanding in response to Olson's concern. Olson, in contrast, testified that he could not recall ever indicating to Cooper that he was interested in informing the employees of the costs of the fund contributions. Olson maintained that he was concerned instead about a 3-year commitment in a contract which he thought would be for only 1 year. He further testified that he believed that the letter of understanding ''clarified the situation.'' The Administrative Law Judge credited Cooper's testimony over that of Olson concerning what transpired during their conversation. We have examined the

record and find that his credibility resolutions are supported by a preponderance of the evidence. Standard Dry Wall Products, Inc., 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951).

The letter of understanding, prepared by Cooper, read as follows:

> In the May 1, 1979 contract negotiations in order to remain with the Michigan Conference of Teamsters Welfare Fund UE Plan, and Central States Southeast and Southwest Areas Pension Plan, a thirty-six (36) month commitment was required due to plan regulations.
>
> The money package negotiated was sixty-seven and one half cents (67-1/2) per hour providing forty-five cents (45 cents) per hour applied to wages and the remaining twenty-two and one half cents (22-1/2) per hour applied as contributions to maintain the Health and Welfare and Pension Plans from May 1, 1979 through April 30, 1980.
>
> In order to maintain the Health and Welfare and Pension plans from May 1, 1980 it will be necessary to deduct the costs from the money package negotiated in future negotiations.

On December 28, Cooper and Olson signed the letter of understanding, the contract,

and the agreements for participation in the two funds. The following was typed onto each participation agreement: ''The letter of understanding between Capitol City Lumber Company and Teamsters Chauffeurs of Local Union No. 580 dated December 14, 1979 (attached) shall become a part of this agreement.''

Respondent apparently contributed the proper amounts to each fund, pursuant to the first step of article XIX and the fund participation agreements, for the period from May 1, 1979, through March 30, 1980. The essence of the dispute in this case involves Respondent's obligation for contributions after that date.

By letter dated February 29, 1980, the Union sought to reopen the contract for negotiations. The Union's notice was untimely, however, since it was sent less than 60 days prior to the expiration date

of the contract. The Union requested negotiations, but Respondent refused to waive its rights and consequently there were no negotiations. By its own terms, therefore, the contract continued in effect for another year, until May 1, 1981. During this second year of the contract, however, Respondent continued to make the same contributions to funds, i.e., those required by the first step of the contract and the participation agreements.[3] The record indicates that the contract subsequently terminated, presumably on April 30, 1981. Respondent ceased making contributions as of that date.

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[3]Actually, Respondent had not paid a portion of the amount that it owed to the pension fund due to a billing error by that fund. Prior to the hearing, Respondent and the Union entered into an agreement whereby Respondent agreed to remit the amount that it owed upon receiving a correct billing from the fund.

Respondent contends that it fulfilled its obligation, as set forth in the collective-bargaining agreement, to make welfare fund and pension fund contributions. Respondent maintains that it signed a collective-bargaining agreement which was effective for 1 year. It claims that Olson objected to the 3-year commitment contained in article XIX when he first saw the contract, and that the letter of understanding was drafted to resolve the ''ambiguity'' created by article XIX. Respondent also claims that article XIX was left unchanged as an accommodation to the Union. Consequently, Respondent argues that the letter of understanding nullifies the three-step progression of contributions contained in article XIX and the funds' participation agreements. In particular, Respondent relies upon the second paragraph of the

letter which states that the total costs of the contract's ''money package'' to Respondent is 67-1/2 cents per hour, per employee. Additionally, Respondent relies upon the last paragraph of the letter, which states:

> In order to maintain the health and welfare, and pension funds from May 1, 1980, it will be necessary to deduct the cost from the money package negotiated in future negotiations.

Since the contract automatically renewed itself for an additional year when the Union did not file a timely notice to reopen it, Respondent concludes that it was obligated to make fund contributions for that additional year only, and at the same first-step rate.

We disagree with Respondent's contentions. In article XIX, Respondent clearly assumed a 3-year commitment to the funds which survived the expiration of the contract. The evidence indicates that this

commitment was negotiated to meet the requirements of the funds, and, indeed, Respondent even acknowledges this. The letter of understanding, as part of the contract, must be construed in a manner that is consisent [sic] with the rest of the contract. On its face, the letter does not purport to nullify article XIX. In fact, the first paragraph of the letter appears to reiterate article XIX,[4] stating that:

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[4] We note that the letter and the contract were signed simultaneously. This too tends to indicate that the first paragraph of the letter affirms the obligations set forth in art. XIX. Respondent's contentions that the letter of understanding modifies art. XIX would be more persuasive if the letter had been drafted and signed after the parties had entered into the contract.

> In the May 1, 1979 contract negotiations in order to remain with the Michigan Conference of Teamsters Welfare Fund UE Plan, and Central States Southeast and Southwest Areas Pension Plan, a thirty-six (36) month commitment was required due to plan regulations.

Further, Respondent's reliance upon the other two paragraphs of the letter is misplaced. These paragraphs set forth certain hourly per-employee costs to Respondent, and mention that fund contributions will be taken into account in future negotiations. As indicated by Cooper's credited testimony, the letter of understanding was drafted in response to Olson's concern about informing the employees of the entire cost of the collective-bargaining agreement. This is entirely consistent with the plain wording of article XIX.

In conclusion, Respondent is contractually obligated to continue contributing to the funds in accordance

with the second and third steps of article XIX, notwithstanding the expiration of the rest of the contract, and the letter of understanding reiterates this 36-month obligation. By failing and refusing to make these contributions, Respondent invaded the Union's ''statutory right as a collective-bargaining representative of employees in the unit to bargain about any change in the terms and conditions of employment for such employees''in violation of Section 8(a)(5) and (1) of the Act.[5]

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[5] C & C Plywood Corporation, 148 NLRB 414, 415 (1964), affd. 385 U.S. 421 (1967), reversing 351 F.2d 224 (9th Cir. 1965).

Member Hunter finds it unnecessary to address the concerns raised by the concurrence, since all members agree that there is a violation of the Act in the instant case.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time truck drivers, and yard employees employeed [sic] by Capitol City Lumber Company at or out of its facility located at 700 E. Kalamazoo St., Lansing, Michigan, but excluding all sales employees, office clerical employees, and casual employees, guards, and supervisors, as defined in the Act, constitute a unit appropriate for the

purposes of collective bargaining within the meaning of Section 9(b) of the Act.[6]

4. At all times material herein, the Union has been and is the exclusive collective-bargaining representative of the employees in the unit described above.

5. By failing and refusing to make welfare and pension fund contributions as required by its collective-bargaining agreement with the Union, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

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[6]The unit description that appears in the Administrative Law Judge's Decision is incorrect.

The Remedy

Having found that Respondent has engaged in unfair labor practices, we shall order Respondent to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act. We shall order that Respondent make its employees whole by paying all welfare and pension fund contributions, as set forth in article XIX of the collective-bargaining agreement, which have not been paid and which would have been paid absent Respondent's unlawful unilateral discontinuance of such payments.[7]

---

[7]Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide for interest at a fixed rate on fund payments due as part of a ''make-whole'' remedy. We therefore leave to further proceedings the question of how much interest Respondent must pay into the benefit fund in order to satisfy our ''make-whole'' remedy. These additional amounts may be determined,

Additionally, in the event that either fund has canceled coverage, we shall order Respondent to reimburse the unit employees, with interest, for any loss of claims and benefits they may have suffered as a result of such cancellation.[8]

(cont.)
depending upon the circumstances of each case, by reference to provisions in the documents governing the fund at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs. etc., but not collateral losses. See Merryweather Optical Company, 240 NLRB 1213, 1216 at fn. 7 (1979).

[8]Any and all issues regarding the cancellation of covergae [sic] are reserved to the compliance stage. Any interest which is payable shall be computed in the manner and amount prescribed in Florida Steel Corporation, 231 NLRB 651 (1977). See, generally, Isis Plumbing & Heating Co., 138 NLRB 716 (1962).

Member Jenkins would require any interest payable to employees to be computed in the manner set forth in his partial dissent in Olympic Medical Corporation, 250 NLRB 146 (1980).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Capitol City Lumber Company, Lansing, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing or refusing to make contributions to the Michigan Conference of Teamsters Welfare Fund and the Central States Southeast and Southwest Areas Pension Fund for the 3-year period as set forth in article XIX of its collective bargaining agreement with Local No. 580, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, which contract covers employees in the following unit:

> All full-time and regular part-time truck drivers, and yard employees employed by Capitol City Lumber Company at or out of its facility located at 700 E. Kalamazoo St., Lansing, Michigan, but excluding all sales employees, office clerical employees, and casual employees, guards, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Make the contributions which it failed to remit to the Michigan Conference of Teamsters Welfare Fund and the Central States Southeast and Southwest Areas Pension Fund for the 3-year period as set forth in article XIX of its collective-bargaining agreement with Local No. 580, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and

Helpers of America, for the employees in the above-described unit.

(b) In the event that either fund has canceled coverage, reimburse the unit employees with interest, for any loss of claims and benefits they may have suffered as a result of such cancellation, as set forth in the section of this Decision entitled ''The Remedy.''

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of reimbursement due.

(d) Post at its Lansing, Michigan, place of business copies of the attached

notice marked ''Appendix.''[9] Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 7, in writing, within 20 days

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[9]In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading ''POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD'' shall read ''POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.''

from the date of this Order, what steps Respondent taken to comply herewith.

Dated, Washington, D.C.

August 30, 1982

Howard Jenkins, Jr.
Member

Robert P. Hunter
Member

(SEAL)

NATIONAL LABOR
RELATIONS BOARD

CHAIRMAN VAN DE WATER, concurring:

While I concur, albeit reluctantly, in my colleagues' finding that Respondent did make a 3-year commitment to make payments into health, welfare, and pension funds, I am increasingly concerned that the Board's already overtaxed processes are being utilized to interpret and enforce contracts when other forums are available to the parties. Both state and Federal courts are available to interpret and enforce existing contracts. As long ago as 1955, the Board took the position in United Telephone Company of the West and United Utilities Incorporated, 112 NLRB 779 at 781, that it was not in the business of interpreting contracts. Some of the comments in that decision are still relevant today. In that decision the Board noted (112 NLRB at 781):

> The complaint alleges no violation of the Act other than the one arising out of the parties' conflicting contract interpretations.
>
> Further on, the Board went on to state:
>
> Regarding the question of which party correctly interpreted the contract, the Board does not ordinarily exercise its jurisdiction to settle such conflicts. As the Board has held for many years with the approval of the courts: ''. . . it will not effectuate the statutory policy . . . for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act.''[2]

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[2] Consolidated Aircraft Corporation, 47 NLRB 694, enfd. 141 F.2d 364 (C.A. 9). See also Crown Zellerbach Corporation, 95 NLRB 753.

The Board went on to dismiss the 8(a)(5) allegation noting at page 782 that the ''Board is not the proper forum for parties seeking to remedy an alleged breach of contract or to obtain specific enforcement of its terms.''

Obviously such a policy approach has been seriously eroded in the years since then. In view of the Board's increasing backlog due in part to inflation and frozen jurisdictional standards since 1959, I believe it more important for this Agency to promptly resolve cases involving more serious policy questions and important representation issues. Therefore, it is time for this Board to revert to the principles earlier announced and to decline jurisdiction over cases involving purely contract interpretation unless a serious statutory issue is involved.

Dated, Washington, D.C.

August 30, 1982

John R. Van de Water,
Chairman

NATIONAL LABOR
RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union representatives of their own choice
To bargain collectively through represenatives of their own choice
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
To refrain from the exercise of any or all such activities.

WE WILL NOT fail or refuse to make contributions to the Michigan Conference of Teamsters Welfare Fund and the Central States Southeast and Southwest Areas Pension Fund for the 3-year period as set forth in article XIX of our collective-bargaining agreement with Local No. 580, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, which contract covers the employees in the following appropriate unit:

All full-time and regular part-time truck drivers, and yard employees employed by Capitol City Lumber Company at or out of our facility located at 700 E. Kalamazoo St., Lansing,

Michigan, but excluding all sales employees, office clerical employees, and casual employees, guards, and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL make the contributions which we failed to remit to the Michigan Conference of Teamsters Welfare Fund and the Central States Southeast and Southwest Areas Pension Fund for the 3-year period as set forth in article XIX of our collective-bargaining agreement with Local No. 580, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, for the employees in the above-mentioned unit.

WE WILL, in the event that either fund has canceled coverage, reimburse unit employees, with interest, for any loss of claims and benefits they may have suffered as a result of such cancellation.

CAPITOL CITY LUMBER COMPANY
(Employer)

Dated_____ By_____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Patrick V. McNamara Federal Building, 477 Michigan Avenue, Room 300, Detroit, Michigan 48226, Telephone 313-226-3244.

APPENDIX C

DECISION OF COURT OF APPEALS

Nos. 82-1682, 82-1850

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CAPITOL CITY
LUMBER COMPANY,

Petitioner,

v.

NATIONAL LABOR
RELATIONS BOARD,

Respondent.

ON PETITION for Review of an Order of the National Labor Relations Board.

Decided and Filed November 11, 1983

Before: MARTIN and CONTIE, Circuit Judges; and PHILIPS, Senior Circuit Judge.

PER CURIAM. Capitol City Lumber Company petitions for review of an order

of the National Labor Relations Board requiring Capitol City to make certain payments into pension and welfare benefit funds maintained for the benefit of its employees, members of Teamsters Union, Local 580. 263 N.L.R.B. 102. The Board, in turn, cross-applies for enforcement of its order pursuant to 29 U.S.C. § 160(e).

In the spring of 1979, Capitol City and Local 580 entered into negotiations for a new contract covering the company's employees. On May 25, the company and the union reached agreement on the terms of that contract. The new contract was to e effective for one year, beginning May 1, 1979, and would be automatically renewed each year unless either party gave notice sixty days prior to the renewal date. Article XIX of the agreement, however, committed the company to making contributions to the employee pension and

welfare benefit funds for a three-year period.[1]

The employees ratified the new agreement immediately but the contract was not submitted to the company president, Olson, for signature until December 14, 1979, because of Olson's ill health. At that time, Olson expressed misgivings about making a three-year commitment to the pension and welfare funds in what was otherwise a one-year renewable contract.

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[1]Article XIX of the contract provided, in relevant part, that the Company would make the following contributions to the funds per week for each employee:

WELFARE FUND

$25 effective May 1, 1979
$28 effective April 1, 1980
$31 effective April 1, 1981

PENSION FUND

$21 effective May 1, 1979
$24 effective May 1, 1980
$31 effective May 1, 1981

Olson was also concerned that his employees did not appreciate the cost implications of the Company's fund contributions. The union representative, Mr. Cooper, explained that a three-year commitment was necessary to meet the participation requirements of the funds' managers. Cooper agreed to draw up an additional letter of understanding to clarify the situation.[2] The resulting letter confirmed

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[2]The letter of understanding reads in its entirety as follows:

> In the May 1, 1979 contract negotiations in order to remain with the Michigan Conference of Teamsters Welfare Fund UE Plan, and Central States Southeast and Southwest Areas Pension Plan, a thirty-six (36) month commitment was required due to plan regulations.
>
> The money package negotiated was sixty-seven and one half cents (67 1/2) per hour providing forty-five cents (45 cents) per hour applied to wages and the remaining twenty-two and one half cents (22 1/2) per hour applied as contributions to maintain the Health and Welfare and Pension Plans from

that a three-year commitment was required to participate in the funds. The letter also spelled out the per-employee cost for the company's first-year contributions to the funds and stated that future wage agreements must take into account the cost of fund payments. This letter of understanding was incorporated into the separate fund participation agreements, and they, along with the collective bargaining agreement itself, were signed by Olson and Cooper on December 30, 1979.

The collective bargaining agreement was renewed May 1, 1980 for another year. However, the company did not increase its payments to the welfare and pension funds

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(cont.)
May 1, 1979 through April 30, 1980.

In order to maintain the Health and Welfare and Pension plans from May 1, 1980 it will be necessary to deduct the cost from the money negotiated in future negotiations.

as called for in Article XIX of the collective bargaining agreement but kept them at the previous year's level. The agreement was not renewed on May 1, 1981, and the company ceased making contributions to the funds altogether. The union filed an unfair labor practice charge, claiming that the company had violated sections 8(a)(5) and (1) of the Act by failing to make contributions to the funds as required by the agreement. The administrative law judge, upheld by the Board, found a violation and ordered the company to remit to the funds all amounts required by Article XIX for the three-year period from May 1, 1979 to April 30, 1982. We agree.

The company's first allegation on review is that the Board lacked jurisdiction to hear the union's complaint. The Board's jurisdiction is limited to resolving disputes involving unfair labor

practices. Section 10(a) of the Act, 29 U.S.C. § 160 (a). The Board does not have the authority to police collective bargaining agreements. NLRB v C & C Plywood Corp., 385 U.S. 421, 427-28 (1967). Here, the company argues that the union alleges nothing more than a violation of a collective bargaining agreement, and, therefore, the union's remedies are limited to the grievance procedure established by the agreement or a breach of contract suit in the courts. However, it is well established that the Board does have jurisdiction to resolve contractual disputes, including those involving a collective bargaining agreement, whenever those disputes are central to the disposition of an unfair labor practice complaint. Id. Here, the unfair labor practice is the company's failure to bargain over changes in the terms and

conditions of employment--the reductions in payments to the pension and welfare funds--in violation of sections 8(a)(5) and (1) of the Act. See Malone v White Motor Corp., 435 U.S. 497, 504 (1978). Because the contractual violation is identical to the unfair labor practice, the Board has jurisdiction to decide both.

The Supreme Court has already upheld the Board's jurisdiction in a very similar case, NLRB v C & C Plywood, supra. There, the company attempted to raise the wages of certain workers without consulting the union and in violation of the wage scale established in the collective bargaining agreement. Capitol City attempts to distinguish this case on two grounds: (1) the bargaining agreement in C & C Plywood had no arbitration provision, and (2) unllike the present case, there was no adequate remedy available to the union by

suit in federal or state court. The subsequent case of NLRB v Strong, 393 U.S. 357, 361 (1969), however, clearly refutes both arguments. In Strong, the court said:

> [T]he Board may proscribe conduct which is an unfair labor practice even though it is also a breach of contract remediable as such by arbitration and in the courts. It may also, if necessary to adjudicate an unfair labor practice, interpret and give effect to the terms of a collective bargaining contract. [citations omitted.]

Finally, the Company argues that the Board's interpretation of the case law would convert any violation of the collective bargaining agreement into an unfair labor practice and thereby allow the Board to police collective bargaining agreements, a practice which the Congress has expressly refused to sanction. The company's fears are not well founded. Most disputes over interpretation of collective bargaining agreements, such as the termination of an employee in alleged

violation of a "just cause" discharge requirement, simply do not rise to the level of an unfair labor practice. Moreover, even those violations of an agreement which could be characterized as unfair labor practices are usually resolved in the arbitration/grievance procedure established by that agreement. The Board has a long history of deferring to the arbitration process both before and after an arbitration award has been made. See Speilberg Mfg. Co., 112 N.L.R.B. 1080 (1955); Collyer Insulated Wire, 192 N.L.R.B. 837 (1971). However, the Board has made it clear that when, as here, the arbitral machinery is no longer available to resolve a dispute because the time limit for filing a grievance has expired and the adverse party will not waive the timely filing requirement, it will assert its jurisdiction. Detroit Edison Co., 206

N.L.R.B. 898 (1973). Capitol City has little cause to complain when its own actions are responsible for the failure of the arbitration procedure.

Moving to the merits of the case, the company argues that the Board's interpretation of the letter of understanding is not supported by substantial evidence because the Board failed to follow the maxim that an ambiguous contract is construed most strongly against the party who drafted it. Had the Board done this, argues the company, it would have been forced to credit the testimony of president Olson that the letter was intended to limit to one year the company's commitment to the pension and welfare funds. We disagree. This maxim is a strategy of last resort to be used only after all other interpretative guides have been exhausted and ambiguity still remains.

No such impasse was reached in this case. The Board, relying on the principle that parts of the same contract are to be construed so as to be consistent with each other, found that the letter of understanding was a response to Olson's concern that the employees understand the costs of the settlement and not an attempt to alter the company's three-year commitment to the funds. There is substantial evidence in the record to support this finding, including the testimony of Cooper, the union representative, and we will not disturb it.

Finally, the company argues that the remedy which the Board ordered was too broad. The Board required the company to remit to the pension and welfare funds all amounts due according to Article XIX from May 1, 1979 to April 30, 1982. The company argues that since there was no contract in

effect between the parties for the last year, the Board had no authority to order it to make contributions to the funds. The company's argument is without merit. While the rest of the collective bargaining agreement expired on April 30, 1981, the commitment to the funds remained in effect. Therefore, the company owed back payments to the funds and the Board was empowered to order them paid.

Accordingly, the order of the Board is enforced.